

The Honorable James L. Robart

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICROSOFT CORPORATION, a Washington  
corporation,

Plaintiff,

v.

MOTOROLA, INC., and MOTOROLA  
MOBILITY, INC., and GENERAL  
INSTRUMENT CORPORATION,

Defendants.

MOTOROLA MOBILITY, INC., and  
GENERAL INSTRUMENT CORPORATION,

Plaintiffs/Counterclaim Defendant,

v.

MICROSOFT CORPORATION,

Defendant/Counterclaim Plaintiff.

CASE NO. C10-1823-JLR

MOTOROLA MOBILITY'S AND  
GENERAL INSTRUMENT'S DAUBERT  
MOTION TO EXCLUDE CERTAIN  
TESTIMONY OF PLAINTIFF'S  
EXPERTS DRS. LYNDE, MURPHY, and  
SIMCOE

**NOTED ON MOTION CALENDAR:  
September 10, 2012**

**ORAL ARGUMENT REQUESTED**

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Defendants Motorola Mobility, Inc. and General Instrument Corporation (collectively, “Motorola”), pursuant to Rules 402 and 702 of the Federal Rules of Evidence, hereby move for an Order precluding certain testimony of three of Plaintiff Microsoft Corporation’s (“Microsoft”) expert witnesses – Kevin M. Murphy, Matthew R. Lynde, and Timothy S. Simcoe – on the grounds that their opinions are not based on a reliable methodology. This motion should be granted for the reasons set forth below.

## I. INTRODUCTION

“A prospective implementer that has requested a license *will negotiate on a private bilateral basis* with the patent owner to determine whether they can arrive at a mutually acceptable agreement on RAND terms.”

“RAND-based IPR policies provide a flexible framework *to help enable customized bi-lateral negotiations* for patent licenses that generally are not limited to just the essential patent claims in connection with a standard.”<sup>1</sup>

These are Microsoft’s own words. The first quote, from Microsoft’s General Manager of Standards Strategy, Amy Marasco, appeared in a 2007 presentation regarding IPR policies and essential licenses. (Ex. 1 at 8.) The second statement was made in a June 14, 2011 submission to the FTC by Ms. Marasco and David Heiner, Microsoft’s Deputy General Counsel. (Ex. 2 at 3.) In these statements, Microsoft unquestionably acknowledges that RAND terms are determined through bilateral negotiations. Consistent with Microsoft’s understanding, Motorola’s position in numerous Court filings in this case is that RAND terms should be determined, in a manner similar to the well-known *Georgia-Pacific* analysis, through a hypothetical bilateral negotiation between Motorola and Microsoft. Microsoft has never challenged this methodology in any of its Court filings.

Never, that is, until Microsoft served its RAND-related expert reports in this case. [REDACTED]

<sup>1</sup> “Ex. \_\_\_\_” refers to the stated Exhibit to the Declaration of Samuel L. Brenner, submitted concurrently herewith. All emphasis is added unless otherwise indicated.

1 [REDACTED]<sup>2</sup> [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]  
 5 [REDACTED]  
 6 [REDACTED]

7 [REDACTED]. Nearly all license agreements are consummated after bilateral  
 8 negotiations, and therefore such agreements are a genuine predicate for the hypothetical  
 9 negotiation of *Georgia-Pacific*. In contrast, [REDACTED]

10 [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED]

13 [REDACTED] Accordingly, any opinion based on such a  
 14 methodology should be excluded, and the portions of the reports of Drs. Murphy, Lynde, and  
 15 Simcoe described herein should be stricken.

## 16 **II. ARGUMENT**

### 17 **A. Expert Testimony: Rule 702 and the *Daubert* Analysis**

18 Rule 702 governs the admissibility of expert testimony. Rule 702 sets out four  
 19 requirements for expert testimony: (1) “the expert’s scientific, technical, or other specialized  
 20 knowledge will help the trier of fact to understand the evidence or to determine a fact in issue”; (2)  
 21 “the testimony is based on sufficient facts or data”; (3) “the testimony is the product of reliable  
 22 principles and methods”; and (4) “the expert has reliably applied the principles and methods to the  
 23 facts of the case.” *See also Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993).

24  
 25 <sup>2</sup> [REDACTED]  
 26 [REDACTED]

1 “Federal Rule of Evidence 702 charges trial judges with the task of ensuring ‘that any and  
 2 all scientific testimony or evidence admitted is not only relevant, but reliable.’ The gatekeeping  
 3 role exercised by district courts ‘entails a preliminary assessment of whether the reasoning or  
 4 methodology underlying the testimony is . . . valid and of whether that reasoning or methodology  
 5 properly can be applied to the facts in issue.’ This role applies to all expert testimony, not only to  
 6 ‘scientific’ expert testimony.” *United States v. Freeman*, 498 F.3d 893, 901 (9th Cir. 2007)  
 7 (citations omitted); *see also Daubert*, 509 U.S. at 589. Microsoft must demonstrate the  
 8 admissibility of its experts’ testimony by a preponderance of the evidence. *Daubert*, 509 U.S. at  
 9 588-90; *Bryant v. Wyeth*, No. 04-1706, 2012 U.S. Dist. LEXIS 100706, \*5 (W.D. Wash. July 19,  
 10 2012); *Many Cultures, One Message v. Clements*, 830 F. Supp. 2d 1111, 1136 (W.D. Wash. 2011).

11 **B. Drs. Lynde’s, Murphy’s, and Simcoe’s [REDACTED] Methodology**  
 12 **Is Not Reliable – It Is Simply Wishful Thinking**

13 [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED] However, as shown below, the policies and  
 16 guidelines of the SSOs themselves, the understanding in the industry, Microsoft’s own documents,  
 17 and the testimony and admissions of Microsoft’s own witnesses make clear that RAND terms are  
 18 determined through bilateral negotiations. [REDACTED]  
 19 [REDACTED]

20 [REDACTED] Because that methodology does *not*, in fact, reflect how RAND negotiations  
 21 *actually* work, it is not reliable, and will not produce reliable results. Fed. R. Evid. 702.

22 **1. RAND Terms Result From Bilateral, not [REDACTED] Negotiations**

23 **SSO Policies and Motorola’s Letters of Assurance (“LOAs”).** As this Court explained  
 24 in its June 6, 2012 Order, “the language of Motorola’s agreements with the IEEE and the ITU  
 25 envisions a negotiation between the parties towards a resulting RAND license.” (Dkt. No. 335 at  
 26 24.) “Motorola,” the Court added in the same Order, “correctly asserts that the IEEE and ITU

1 Policies contemplate that RAND licenses *will be negotiated between the patent holder and the*  
 2 *implementer of the standard.*” (*Id.* at 18.)

3 Critically, the Court’s observations correctly reflect the actual language and meaning of the  
 4 LOAs Motorola sent to the ITU and IEEE – the actual contracts to which Microsoft is a third-party  
 5 beneficiary. For example, Motorola’s LOAs to the ITU make clear that the negotiations over the terms  
 6 of RAND licenses “*are left to the parties concerned* and are performed outside the ITU-T ISO/IEC.”  
 7 (Ex. 15 at MOTM\_WASH1823\_0000039; *see also id.* at MOTM\_WASH1823\_0000036  
 8 (“Negotiations are left to the parties concerned and are performed outside the ITU-T, ITU-R, ISO,  
 9 or IEC.”); 046 (same); 053 (same); 057 (same); 061 (same).) Consistent with Motorola’s LOAs,  
 10 moreover, the “Common Patent Policy” for the ITU states:

11 The detailed arrangements arising from patents (licensing, royalties, etc.) *are left*  
 12 *to the parties concerned*, as these arrangements might *differ from case to case*.

13 (Ex. 13 at 8.) Indeed, the ITU’s Legal Officer has explicitly stated that there is “[n]o uniform  
 14 definition of RAND” and that “[t]he licenses and their prices are generally *negotiated* on a  
 15 *bilateral* basis between the patentee and each licen[s]ee, outside the [SSOs].” (Ex. 19 at 12.)  
 16 There can be no question that the ITU, which recognizes that the terms of RAND licenses may “differ  
 17 from case to case,” envisions and expects that such differing terms will result from bilateral  
 18 negotiations between “*the parties concerned*,” and *not* from [REDACTED]

19 [REDACTED] <sup>3</sup>

20 Similarly, Motorola’s contractual commitments to the IEEE make clear that the IEEE does  
 21 *not* mandate or even recommend that licensing negotiations [REDACTED] as  
 22 required by Microsoft’s experts. The IEEE patent policy expressly states that the “IEEE is not  
 23 responsible . . . for determining whether any licensing terms or conditions provided in connection

24 <sup>3</sup> [REDACTED]  
 25 [REDACTED] Microsoft has also suggested that the only  
 26 material term in RAND licenses that is left open is the RAND royalty. (July 9, 2012 Telephone Conf. Tr. at 6.)  
 [REDACTED] – a result that is obviously inconsistent  
 with the ITU’s own understanding that the terms of RAND licenses will differ from licensee to licensee.



1 with submission of a Letter of Assurance, if any, or in any licensing agreements are reasonable or  
 2 non-discriminatory.” (Ex. 12 at MOTM\_WASH1823\_0054739.) Motorola’s LOAs to the IEEE  
 3 expressly state that “[t]he IEEE takes *no position* with respect to the reasonableness of rates,  
 4 terms, and conditions of the license agreements *offered by patent holders or patent applicants.*”  
 5 (Ex. 16 at MOTM\_WASH1823\_0000002; *see also id.* at 06 (same); 08 (same); 10 (same); 12  
 6 (same); 14 (same); 16 (same); 18 (same); 21 (same); 23 (same); 25 (same); 27 (same); 29 (same);  
 7 31 (same); 33 (same).)

8 Like the ITU, the IEEE envisions that the terms of RAND licenses will be the product of  
 9 bilateral negotiation between the parties to the resulting license. In fact, the IEEE’s Antitrust and  
 10 Competition Policy actually goes so far as to *forbid* parties in the IEEE from engaging in  
 11 [REDACTED] about RAND terms during the technical standards setting process.<sup>4</sup> (Ex.  
 12 20 at 3.) Indeed, the IEEE’s Standards Board Operations Manual mandates that “no discussions or  
 13 other communication[]” of “[s]pecific patent license terms . . . other than distribution of Accepted  
 14 Letters of Assurance” “shall occur during IEEE-SA working group standards-development  
 15 meetings or other duly authorized IEEE-SA standards-development technical activities.” (Ex. 22  
 16 at § 5.3.10.2.)

17 In other words, the IEEE forbids [REDACTED]  
 18 [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED]  
 21 [REDACTED]

22 [REDACTED]. Such a reading drastically misrepresents Motorola’s contractual  
 23

24 <sup>4</sup> Recently, a group of 13 companies announced the launch of an exploratory forum under the IEEE’s “Industry  
 25 Connections” program that will consider whether an 802.11 patent pool can be created. Such a pool – if it ever gets  
 26 past the exploratory stage and actually gets formed – would presumably involve at least a partial multilateral  
 negotiation to determine the terms of the pool agreement. Given that the 802.11 standard was first published nearly 15  
 years ago, any such negotiation is not the type of [REDACTED] envisioned by Microsoft’s experts.

commitments in its LOAs and the actual process employed by patent holders in the marketplace to determine RAND terms.

**Understanding of the Industry and Academics.** Both industry participants and academics considering the meaning of the RAND commitment understand that a RAND license is the product of bilateral negotiations between the patent holder and the prospective licensee. One example of this industry understanding is the comments submitted in connection with the FTC's 2011 Workshop on Standard-Setting Issues. In one comment, for instance, the Association for Competitive Technology recognized that the "practice" regarding licensing in the standards context is "*bilateral negotiations*." (Ex. 23 at 5.) Similarly, the Telecommunications Industry Association explained that "[t]he RAND framework has enabled industry participants *to bilaterally negotiate* effective license agreements that meet the specific needs of each licensee and licensor." (Ex. 24 at 10.) Michele Herman, then a partner at Davis Wright Tremaine LLP (and Microsoft's former Senior Director of Intellectual Property Strategy) observed that, "[b]ecause standards-essential patent claims are not licensed in isolation, it is necessary for parties to *negotiate their own bilateral agreements* irrespective of whether specific patents or license terms are disclosed to the SSO *ex ante*." (Ex. 25 at 5.) Nokia observed in its own comment that "the normal way" is for royalties in the standards context "*to be negotiated bilaterally*." (Ex. 26 at 7.) These comments are not unexpected, given that the FTC itself, in its request for comments, observed that "[s]etting specific terms of the patent license generally occurs in *bilateral negotiations between the patent holder and individual standards users* after the standard-setting process is completed, sometimes long after the standard has been implemented." (Ex. 27 at 28037.) None of this is surprising – patent licenses are negotiated bilaterally, [REDACTED]

Even a cursory survey of the legal and economic literature on RAND demonstrates that the overwhelming understanding among economists and legal academics mirrors the understanding of industry participants, that (absent the future adoption of some new RAND policy by an SSO) the

holders of SEPs and the SSOs envision that licenses on RAND terms will be the product of bilateral negotiations between the patent holder and the prospective licensee. *See, e.g.:*

- Roger G. Brooks & Damien Geradin, *Interpreting and Enforcing the Voluntary FRAND Commitment*, *International Journal of IT Standards and Standardization Research*, 9(1), 1-23, January-June 2011 (Ex. 14), at 20 n.10 (“‘Fair and reasonable’ licensing terms would therefore consist of those terms determined through fair, **bilateral negotiations** between individual IPR owner and standard implementer in accordance with the market conditions prevailing at the time of such negotiations.”);
- Damien Geradin, Anne Layne-Farrar, & A. Jorge Padilla, *The Complements Problem Within Standard Setting: Assessing the Evidence on Royalty Stacking*, 14 B.U. J. Sci. & Tech. L. 144 (Ex. 29), 148 (2008) (recognizing the “current SSO system of confidential **bilateral negotiations**”);
- Damien Geradin, Anne Layne-Farrar, & A. Jorge Padilla, *The Ex Ante Auction Model for The Control of Market Power in Standard Setting Organizations*, CEMFI Working Paper No. 0703, May 2007 (Ex. 28), at 32 (“**Actual negotiations take place bilaterally** and confidentially . . .”);
- Damien Geradin & Miguel Rato, *Can Standard-Setting lead to Exploitative Abuse? A Dissonant View on Patent Hold-Up, Royalty Stacking and the Meaning of FRAND*, TILEC Discussion Paper, DP 2006-032 (Ex. 30), at 12 (Nov. 2006) (“‘Fair and reasonable’ licensing terms would therefore consist of those terms determined through fair, **bilateral negotiations** between individual IPR owner and standard-adopter in accordance with the market conditions prevailing at the time of such negotiations.”);
- Anne Layne-Farrar, A. Jorge Padilla, & Richard Schmalensee, *Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of Frand Commitments*, 74 Antitrust L.J. 671 (Ex. 31), 705 (2007) (noting that RAND rates are set by the parties “through **bilateral negotiations**”);
- Doug Lichtman, *Understanding the RAND Commitment*, 47 Hous. L. Rev. 1023 (Ex. 18), 1044-45 (2010-11) (“After a standard has been promulgated, firms that wish to invoke the RAND commitment must still contact the relevant patent holders and **negotiate their own bilateral deals**. . . . every other participant in that same standard-setting process ultimately found itself in a similar, overlapping, confidential, **bilateral negotiation**.”); and
- Mario Mariniello, *Fair, Reasonable, and Non-Discriminatory (FRAND) Terms: A Challenge for Competition Authorities*, *Journal of Competition Law & Economics*, 7(3), 523-41 (Ex. 32), 532 (2011) (“I take the view that **FRAND is the outcome of a bilateral hypothetical negotiation** between the licensor and the licensee . . .”).

1 This consensus among industry participants and academics is even fully reflected in the  
 2 understandings of professional legal organizations. For example, the American Bar Association's  
 3 Standard Development Policy Manual, which was prepared with "substantial editorial and  
 4 substantive assistance" (Ex. 17 at v), from Amy Marasco (Microsoft's General Manager of  
 5 Standards Strategy) and Michele Herman (Microsoft's former Senior Director of Intellectual  
 6 Property Strategy), recognizes that when users of a standardized technology seek out licenses  
 7 covering their use, RAND commitments are determined through bilateral negotiations:

8 "[RAND] licensing commitment[s are] often stated as an absolute (*i.e.*, that the  
 9 [patent owner] must grant the required licenses). However, it is reasonable to  
 10 require that such licenses be granted only upon a request by a potential licensee  
 and upon the conclusion of *bilateral negotiations*."

11 (Ex. 17 at 49.)

12 **Statements by Microsoft.** [REDACTED]

13 [REDACTED]  
 14 [REDACTED]. For  
 15 example, as noted above, Ms. Marasco explained in a presentation regarding IPR policies and  
 16 essential licenses that "[a] prospective implementer that has requested a license will negotiate on a  
 17 private *bilateral* basis with the patent owner to determine whether they can arrive at a mutually  
 18 acceptable agreement on RAND terms." (Ex. 1 at 8.) Similarly, in a June 14, 2011 submission to  
 19 the FTC regarding a Patent Standards Workshop, Ms. Marasco and David Heiner, Microsoft's  
 20 Deputy General Counsel, reiterated that "RAND-based IPR policies provide a flexible framework  
 21 to help enable *customized bi-lateral negotiations* for patent licenses that generally are not limited  
 22 to just the essential patent claims in connection with a standard." (Ex. 2 at 3.)

23 Consistent with this understanding, Mr. Heiner testified in *this case* that RAND license  
 24 terms are typically arrived at through bilateral negotiation:

25 Q: You agree that RAND license terms are typically arrived at through bilateral  
 negotiation, correct?

26 A: Typically, yes.

1 ...

2 Q: In large part, the parties collectively and bilaterally determine what is RAND in  
3 their specific contexts through negotiations, correct?

4 A: Typically.

5 (Ex. 9 at 33:6-8; 39:10-13.) Mr. Heiner also agreed that licensing considerations “would typically  
6 be fleshed out *as part of bilateral negotiations* between the [prospective] licensor and  
7 [prospective] licensee.” (*Id.* at 32:15-18.) Finally, Mr. Heiner confirmed that “there will at times  
8 be significant contention between the patent owner and implementer about what constitutes  
9 reasonable licensing terms, but this is to be expected, as with commercial negotiation on any input  
10 cost component, and *has for the most part been readily resolved through bilateral negotiations.*”  
11 (*Id.* at 37:10-17.) Neither Dr. Murphy nor Dr. Simcoe considered this testimony.

12 **Microsoft’s Own Experts.** Given the overwhelming evidence that the SSOs envision  
13 bilateral negotiations of RAND licensing terms, and that this understanding is shared by the  
14 industry in general and Microsoft in particular, it is not surprising that even Microsoft’s *own*  
15 *experts* – [REDACTED] – explicitly recognize that RAND  
16 terms are the result of bilateral negotiations. For example, in testifying before the ITC, Dr.  
17 Murphy [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 In his expert report in this litigation – [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED] Professor Simcoe's  
8 recognition [REDACTED] is in  
9 accordance with what Professor Simcoe has said in previous publications and [REDACTED]  
10 [REDACTED] For  
11 example, in comments recently provided to the FTC, Professor Simcoe stated that:  
12  
13 One approach to the “reasonable” prong of the RAND commitment is to treat it as a  
14 promise to forgo lost profits as the approach to calculating damages in patent  
15 infringement litigation. In its place, courts would presumably set reasonable  
16 royalty damages based on a *hypothetical negotiation between a willing licensor*  
17 *and willing licensee*.  
18  
19 (Ex. 11 at 9; *see also id.* at 16.)  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]

24 **2. Microsoft's Experts' Opinions Are Not Based On A Methodology That**  
25 **Provides Reliable Results**

26 Despite the facts described above showing that RAND terms are determined in the real world through bilateral negotiations and Microsoft experts' previous statements recognizing that a

1 bilateral determination is appropriate, [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 As shown above, the SSO contracts at issue, and the commentary on those contracts,  
6 reflect the understanding that RAND terms should be determined based on a methodology that  
7 contemplates a bilateral negotiation [REDACTED] Unlike bilateral negotiations,

8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED] For  
11 example, in this case, a bilateral negotiation would be limited to negotiations between just  
12 Motorola and Microsoft, and would be focused only those factors, considerations and facts  
13 relevant to these parties and their respective businesses. When negotiating material terms (e.g.,  
14 term, assignability of the agreement, scope of the grant back, field of use, exclusions, carve outs,  
15 covered products, etc.), Motorola and Microsoft would emphasize and de-emphasize certain  
16 factors, considerations and facts based on each party's business model and would mold the terms  
17 of the license accordingly. Thus, such a negotiation – which ordinarily takes months between just  
18 two parties – would reflect compromises and concessions that are specific to Motorola and  
19 Microsoft. This is exactly the type of “flexible framework to help enable customized bi-lateral  
20 negotiations for patent licenses” envisioned by the SSOs that Microsoft pointed out in its FTC  
21 submission. (Ex. 2 at 3.)



<sup>5</sup> Microsoft has made no secret of the fact that its participation in the MPEG LA pool has been about promoting broad use of the H.264 standard, rather than about receiving the true value of its SEPs. As Dean Hachamovitch, Microsoft's corporate vice president in charge of the Internet Explorer team at Microsoft explained in a May 3, 2010 blog post, "Microsoft pledged its patent rights to [the MPEG LA pool] *in order to make its rights broadly available under clear terms, not because it thought this might be a good revenue stream.*" (Ex. 34 at 1.)

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19 The critical issue is what Motorola and Microsoft would have done to arrive at a license  
20 consistent with the IEEE and ITU policies and Motorola's RAND assurances. Plainly, they would  
21 have undertaken the bilateral negotiation contemplated by the SSOs and entirely understood by  
22 Microsoft's own executives and others who have negotiated bilateral licenses, rather than  
23

24 <sup>6</sup> In addition, the timing of when the MPEG LA and Via Licensing patent pool agreements were negotiated further  
25 demonstrates the unreliability of the conclusions of the opinions of Microsoft's experts. Microsoft's experts focus on  
26 a multilateral negotiation that takes place *before* the standard is adopted. (*See, e.g.*, Ex. 7 at 3, 22; Ex. 8 at 1; Ex. 5 at 7; Ex. 6 at 2; Ex. 21 at 150-51.) It is undisputed that the terms of the MPEG LA and Via Licensing agreements were set *after* the standard was adopted. In the case of Via Licensing, these terms were set more than five years after the first 802.11 standard was adopted.

1 [REDACTED]. Given  
 2 (1) the ubiquitous acceptance by academics, Microsoft's own personnel, and – most importantly –  
 3 the LOAs and policies of the SSOs themselves that RAND terms are determined through bilateral  
 4 negotiations, (2) the paucity of evidence that supports Microsoft's proposed [REDACTED]  
 5 [REDACTED] and (3) the questionable application of that methodology to the facts of  
 6 this case, the opinions of Microsoft's expert are unreliable and will not be helpful to the jury. Fed.  
 7 R. Evid. 702; *Daubert*, 509 U.S. 579. As such, the reports and testimony of Drs. Murphy, Lynde,  
 8 and Simcoe, insofar as they [REDACTED]  
 9 [REDACTED] should be excluded in accordance with the gatekeeping  
 10 functions set forth by the Supreme Court in *Daubert*. 509 U.S. at 589; *see also Freeman*, 498 F.3d  
 11 at 901.

### 12 **III. CONCLUSION**

13 The Court has a duty to serve as a gatekeeper and to exclude expert testimony that is based on  
 14 an unreliable methodology. [REDACTED]  
 15 [REDACTED]  
 16 [REDACTED]  
 17 [REDACTED]  
 18 [REDACTED] [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED]

21 For the foregoing reasons, Motorola respectfully requests that the Court grant this motion.  
 22  
 23  
 24  
 25  
 26

1 DATED this 27th day of August, 2012.

2 Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 27th day of August, 2012.

/s/ Marcia A. Ripley

Marcia A. Ripley